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No. 91-6

Supreme Court, U
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In The

Supreme Court of the United States

October Term, 1991

G.A.B. SERVICES, INC.,

Petitioner,

v.

WILLIAM C. COOPER; and NATIONAL UNION FIRE INSURANCE COMPANY OF PITTSBURGH, PENNSYLVANIA,

Respondents.

PETITIONER'S REPLY BRIEF

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This appeal concerns the trial court's improper remand of an action sounding in bad faith and intentional infliction of emotional distress. Further, the appeal concerns the Tenth Circuit's failure to consider the trial court's Order on appeal. However, the sole purpose of submitting this Reply Brief is to respond to Respondents' closing sentence in its Brief in Opposition to Petitioner's Petition for Certiorari which requests as follows: "Respondent hereby requests that this Court award attorney's fees and costs pursuant to 28 U.S.C. § 1447(c)."

Respondent requested attorney's fees and costs pursuant to 28 U.S.C. § 1447(c) in its original motion to remand in the trial court. However, this request was not ruled on by the trial court in its Order of Remand filed on June 7, 1990. Notably, Respondent did not pursue his request for costs and attorney's fees pursuant to § 1447(c) in the trial court nor did Respondent counter-appeal on this issue to the Tenth Circuit.

It is elementary that, if a party wants affirmative relief from an appellate court, that party has the responsibility for bringing the issue to the court in the form of a cross-appeal. In *Letulle v. Scofield*, 308 U.S. 415 (1940), the Court held as follows:

> A respondent or an appellee may urge any matter appearing in the record in support of a judgment, but he may not attack it even on grounds asserted in the court below, in an effort to have this court reverse it, when he himself has not sought a review of the whole judgment, or that portion which is adverse to him.

Id. at 421-422

By the *Letulle* Court's ruling, Respondent would have had the obligation to seek review of the trial court's failure to award him costs and attorney's fees. Respondent took no such action in the Tenth Circuit, and has not attempted until now to take that action in the United States Supreme Court.

Similarly, the Court, in *Penfield Co. of California v. Securities and Exchange Commission*, 330 U.S. 585 (1947), ruled that a respondent could not raise an issue in its response to a petition for certiorari when it had failed to raise the issue on appeal. That Court stated:

> Young raises objections that go to the merits of the judgment of contempt. These were considered and determined against him by the district court. Since he did not appeal from that adverse judgment, he is precluded from renewing the objections at this stage.

Id. at 594

Respondent's statement is merely an attempt to cloud the issues before this Court. The issue here is not the appropriateness of costs, which was never appealed to the Tenth Circuit. Rather, the issue focuses on the Tenth Circuit's decision which is in conflict with this Court's decision in *Thermtron Products, Inc. v. Hermansdorfer*, 423 U.S. 336 (1976), and on the unconstitutional nature of the Tenth Circuit's application of § 1447(d) in these circumstances.

For the reasons stated in the Petition, certiorari should be granted. However, for the reasons above-stated, Respondent's request for attorney's fees and costs should be denied.

Respectfully submitted,

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